No. 84-1070

IN THE

Supreme Court of the United States

October Term, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS

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Interest of the Amicus

The American Jewish Congress is an organization of American Jews, founded in 1918, dedicated to the protection of the religious, political, civil and economic liberties of all Americans, but particularly those of American Jews. No liberty enjoyed by Americans is more important to American Jews than religious liberty. For this reason, the American Jewish Congress has filed many briefs in this Court and elsewhere in cases raising religious liberty issues.

The principle of non-establishment, enshrined in the First Amendment, is an indispensable element of religious liberty. Hence, AJCongress has repeatedly urged that the Establishment Clause be given a generous construction. It has appeared repeatedly before this Court urging the invalidation of statutes intended to provide subsidies for religious education. But the Establishment Clause, more so perhaps than other

constitutional principles, must not be expanded indefinitely, for to do so inevitably leads to clashes with that other guarantee of religious liberty, the Free Exercise Clause.

After careful study, AJCongress believes that the Supreme Court of Washington has interpreted the Establishment Clause too expansively in this case. It is filing this brief both to express those views, and to propose an analysis of this case which leaves intact this Court's Establishment Clause jurisprudence.

The brief is filed with the consent of the parties.

FACTS

The facts of this case are simple. Petitioner Larry Witters, who is blind, has been found eligible for vocational rehabilitation under a Washington statute, Rev. C. Wash. § 74.16.181 (1985), providing for funding to blind persons "so that they can be trained to engage in gainful employment and become self-supporting" (Decision of Office of Hearings, Washington Department of Social and Health Services, App. F-2).

Witters' application was denied by the Washington State Department of Social and Health Services* (hereafter "Department") on the sole ground that he intended to use the funds to pay for ministerial training at a school of theology. The Department found that payments under these circumstances would

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* The Department has since been renamed the Department of Services for the Blind, Brief in Opposition to the Petition for a Writ of Certiorari at 1, n.1.

violate the Washington State Constitution, Art. IX, § 4; Art. I, § 11. [App. F-2]. That decision was in turn upheld by both an administrative law judge, [App. E-1], and the trial court [App. C-1 and D-1].

The Washington Supreme Court refused to pass on the state constitutional issues [App. A-2]. Instead, it held that granting Witters' request would violate the Establishment Clause of the First Amendment to the United States Constitution. It also held that Witters' Free Exercise Clause rights were not violated by the denial of benefits on the sole ground that he wished to use them at a school of theology [App. 1A-2]. One judge dissented [App. B-1].

This Court granted certiorari, 53 U.S.L.W. 3702 (1985).

Summary of Argument

1. Both the Establishment and Free Exercise Clauses are indispensible for the

protection of religious liberty, and they must be understood as part of a whole, so that one does not dominate the other, and distort the American notion of religious liberty.

2. Non-establishment, as manifest particularly in the prohibition on financial aid to religious institutions, is an essential element of religious liberty. So is the guarantee of free exercise which protects not only the right to believe but the right to practice one's faith without penalty.

3. Where these principles clash, as will happen not infrequently in a 20th century government, the Court should balance the interests protected by each Clause to determine which of the two religion clauses is more strongly implicated.

4. Because the Establishment Clause was drafted, in large part, to prevent government from taxing citizens to support

churches, any direct payment to a church or religious educational institution raises Establishment Clause concerns. Since payment of Witters' tuition is such a payment, it follows that the Establishment Clause is solidly implicated in this case.

5. Nevertheless the significance of that fact is mitigated by several factors which gain significance in light of current conditions.

a) Only those practices which substantially advance religion are unconstitutional. In comparison with other practices upheld or invalidated by this Court, Witters' case falls on the permissible side, particularly since it does not enhance the role of religion vis-a-vis other social forces.

b) The benefit conferred on Witters is available for a "broad spectrum" of vocational programs, and only as the result of private choice. There is thus little

risk that any of the four dangers the Establishment Clause was designed to forestall will occur. There is here no

i. evidence (or even likelihood) of religious coercion;

ii. likelihood that religious institutions will become overly dependent on government because available funds may be used in a wide variety of institutions, solely as the result of independent choices of a non-self-selecting class.

iii. parallel to the use of the taxing power for the regular support of churches which was the historical motivation for the Establishment Clause.

iv. hint that granting Witter's request will make religion "relevant to one's standing in the political community."

6. The Free Exercise Clause is applicable to a wide variety of cases. It has been held to require government to allow religious individuals to participate in

social welfare programs where only their religious beliefs stand in the way of eligibility. The Clause, whether or not requiring the state to pay Witters' tuition, does create "room in the joints" for such payment.

7. Given the weakness of the Establishment Clause claim in this case, the Free Exercise Clause pulls this case over the line. There is, however, no need for the Court to now determine whether the Free Exercise Clause mandates that Witters be allowed to participate in the vocational rehabilitation program, for constitutional questions should not be decided absent strict necessity to do so.

Argument

The sometimes conflicting demands of the Establishment and Free Exercise Clauses, particularly as applied to the varied activities of the modern state, have forced this court to struggle:

> to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Walz v. Tax Comm'n, supra, 397 U.S. 664, 668 (1970). See also Thomas v. Review Board, 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting).

This neutral course requires that neither clause may be sacrificed entirely in favor of the other. Each must be understood and applied with reference to the other, always with an eye towards achieving the ultimate goal of the clauses viewed as a whole: the protection of religious liberty in a pluralistic society, School District of Abington Twshp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

Such religious liberty, as understood in both federal and state constitutional law, mandates that religion be a voluntary

enterprise, without government sanction or support, Larkin v. Grendel's Den, 459 U.S. 116 (1982); Engel v. Vitale, 370 U.S. 421 (1962); Everson v. Bd. of Educ., 330 U.S. 1 (1947). This means stringent restrictions on governmental assistance to religious institutions. See, e.g., Mueller v. Allen, 103 S.Ct. 3062 (1983); Flast v. Cohen, 392 U.S. 83 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).*

The decisions of this Court, see, e.g., Wolman v. Walter, 433 U.S. 229 (1977), PEARL v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971) reflect this understanding.

The prohibition on financial aid to religious institutions is not merely

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* All but a few state constitutions mirror this understanding, and embody rigorous and explicit restrictions on aid to religious education. See C. J. Antieau, P. M. Marks, & T. C. Burke, Religion under the State Constitutions 23 (1965).

"technical," or ancillary to other, more significant, purposes of the religion clauses. It is, rather, at the very core of that Amendment. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity," Walz v. Tax Comm'n, supra, 397 U.S. at 668.

Government assistance not only unfairly compels persons to support churches not of their own choosing, Everson v. Bd. of Educ., supra, 330 U.S. at 12-13, but also poses significant risks to the independence and autonomy of religious institutions, Lynch v. Donnelly, 104 S.Ct. 1355, 1366 (1984) (O'Connor, J., concurring); Lemon v. Kurtzman, supra, 403 U.S. at 620, the political and religious neutrality of government, Engel v. Vitale, supra, and threatens to make religion relevant to one's

standing in the political community, Lynch v. Donnelly, supra, 104 S.Ct. at 1366 (O'Connor, J., concurring).

Just as the Establishment Clause protects against governmental support for religion, so the Free Exercise Clause protects against unnecessary government interference with religion. Particularly with the growth of the welfare and regulatory state, religious liberty, as guaranteed by the Free Exercise Clause, has come to mean more than the right to hold and teach beliefs at variance with those of the majority, cf. Reynolds v. U.S., 98 U.S. 145 (1878).

It guarantees, for example, that individuals will not be penalized by government for putting those beliefs into practice, Thomas v. Rev. Bd., supra, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963), even if, as in Thomas and Sherbert, the

result is what might arguably be termed an indirect subsidy of religion.

In view of these now well settled principles in cases such as this, both free exercise and non-establishment values are implicated. The single-minded application or either one leads to diametrically opposite conclusions wholly at variance with the constitutional policy of not showing "partiality to any one group" and of allowing religious groups to "flourish according to the zeal of its adherents and the appeal of its dogma," Zorach v. Clauson, 343 U.S. 306, 313 (1952).

One could, of course, simply label this an Establishment or Free Exercise Clause case, and decide it accordingly. Such an approach is both simple minded and sterile. It fails to acknowledge the existence of the sometimes competitive nature of the values which safeguard religious liberty.

The courts must therefore determine which of the two religion clauses is more strongly implicated here -- a process which in our view calls for a balancing approach sensitive to each clause.

On the narrow facts of this case, that balance tips in favor of a finding that the Establishment Clause would not be violated if Witters' application were granted. Since the only basis for denying Witters' application was the federal Constitution's Establishment Clause, this conclusion is sufficient to dispose of this case at this time.

I. This Case Solidly Implicates Establishment Clause Values

The history of the Establishment Clause begins with challenges to the authority of government to utilize its taxing power to raise funds for the support of religious institutions, PEARL v. Nyquist, supra; Lemon v. Kurtzman, supra. "[A state] cannot consistently with the 'establishment

of religion' clause of the First Amendment contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church." Everson v. Bd. of Educ., supra, 330 U.S. at 16.

Inland Empire School of the Bible, which Witters attended as a candidate for ordination, and for which he sought funds under the Washington statute, is no doubt such an institution. Petitioner himself describes it as "a private religious institution." [Petition for Certiorari at 6].

Aid to a "pervasively sectarian institution" such as Inland Empire is ordinarily impermissible, Mueller v. Allen, supra, 103 S.Ct. at 3069; Hunt v. McNair, 413 U.S. 734, 743 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); particularly where it takes the form of an undifferentiated grant to the institution which can be used at the institution's discretion.

Viewed solely in terms of the institution's budget, there is little to distinguish general operating subsidies, paid directly to the institution, and the state's agreement to pay the tuition of one or many students. Under the principles discussed above, the judgment of the Supreme Court of Washington is therefore understandable. There can be no question that the governmental expenditures that Witters seeks, and the state resists, solidly implicate traditional Establishment Clause concerns.

II. In the Circumstances of This Case, The Payments Witters Seeks Do Not Establish Religion

A. Washington's Vocational Rehabilitation Statute and Its Application to This Case Lack a Religious Purpose

This case, however, should not be disposed of so mechanically. Several significant factors mitigate the constitutional significance of government payments to the Inland Empire School of the Bible. We analyze these in light of the

three part test first laid down in Lemon v. Kurtzman, supra, and restated most recently in Tony and Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953, 1964 n.30, (1985).

These tests should not be applied here in the abstract, but must be judged in light of overall societal conditions, Lynch v. Donnelly, supra.

The Washington state legislature and its Department of Services for the Blind have only the remotest and most indirect connection with the fact that Witters would be paying his seminary tuition with state funds. Washington's program was not created with the purpose of aiding religion. The vocational rehabilitation program embodied in Wash. Rev. Code § 74.16.181 (1985) cannot plausibly be treated as if it were intended to subsidize religion, or, as if it were even reasonably foreseeable that it would do so. Its secular purpose is self-evident and

beyond challenge -- aiding those blind persons with the potential to be self-sufficient.

This rehabilitative goal is a valid secular purpose. And because rehabilitation cannot take place without the assistance of the person to be rehabilitated, the state must enlist his support to achieve its end. Of necessity, this requires that the state defer to all reasonable career goals. Thus, this is not a case where a more secular means is available to carry out the state's secular purposes, Lynch v. Donnelly, supra, 104 S.Ct. at 1372 n.4 (Brennan, J., dissenting).

This is also not a case, such as that hypothesized by the Chief Justice, dissenting in part in PEARL v. Nyquist, supra, 413 U.S. at 801-02, where an ostensibly secular statute is merely a subterfuge for funding churches or religious education. It is not even a case like Mueller v. Allen, supra.

There, statistical evidence suggested not only that the legislative purpose of a tuition tax deduction was to encourage parochial school attendance, but that the overwhelming bulk of the benefits of the deduction flowed directly or indirectly to religious institutions. Nevertheless, this Court held -- AJCongress thinks incorrectly -- that these factors were irrelevant to constitutional analysis.

No more persuasive on this record is the argument that a decision by the Department to grant Witters' application has such a religious purpose. As far as appears, it matters not at all to the Department whether Witters receives vocational training in law, theology or baking. Of course, if there were proof that the Department routinely urged the visually handicapped to use their benefits to attend seminaries, a different, and far easier, case would be presented. This, however, does not appear to be that case.

B. The Challenged Statute, Either on its Face or as Applied, Does Not Have the Effect of Advancing Religion

When viewed from Witters' perspective, granting his application has the effect of advancing religion. Absent these funds, Witters may be unable to attend school. Granting him these tax-raised funds thus enables him to obtain a religious education, a state of affairs ordinarily proscribed by the Constitution.*

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* This effect cannot, and should not, be ignored by the Court. If the fact that religion is benefitted becomes irrelevant as a matter of law -- as broad and unfortunate dicta in both Lynch v. Donnelly, supra, 104 S.Ct. at 1363, and Mueller v. Allen, supra, 103 S.Ct. at 3069-70 suggest -- then almost any statute which does not explicitly call for aid to pervasively religious institutions will pass constitutional muster, no matter how it in fact operates. That would be a departure from this Court's settled rule that the Constitution "nullifies sophisticated as well as simple-minded" schemes to circumvent its guarantees, cf. Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960), citing, Lane v. Wilson, 307 U.S. 268, 275 (1939); Meek v. Pittenger, supra, 421 U.S. at 374-75 (Brennan, J., concurring in part, and dissenting in part). It would also undermine a direct holding in the parochial school aid context that a statute constitutional on its face may violate the Establishment Clause as applied, Wheeler v. Barrera, 417 U.S. 402 (1974).

Religious education is an integral part of the mission of every church and is for Establishment Clause purposes no less religious than prayer or Bible reading, as this Court has repeatedly held, e.g., PEARL v. Nyquist, supra; Lemon v. Kurtzman, supra, Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

However, this Court's decisions make clear that not every incidental benefit to religion is sufficient to amount to a constitutional violation, PEARL v. Nyquist, supra, at 783, n.39. If an unconstitutional "effect" were to be equated with the simple and unvarnished fact that a government action facilitates religious practice or observance, then, as Justice Rehnquist argued in Thomas v. Rev. Bd, supra, 450 U.S. at 720-22, all accommodation of religion would be unconstitutional.

Just as not every accommodation purportedly made under the Free Exercise Clause can escape condemnation as an

establishment by talismanic invocation of the Free Exercise Clause, Wisconsin v. Yoder, supra, 406 U.S. at 220-21, so, too, not every practice which in fact aids religion is unconstitutional, Zorach v. Clauson, 343 U.S. 306 (1952). Some simply have too remote an impact on both religion and society to rise to the level of an establishment.

This Court's decisions embody objective criteria for judging whether the effect of a particular statute or practice has the direct and immediate effect of advancing religion. Under these standards, enabling Witters to pursue the career of his choice would have only on a de minimis impact on religion and society.

First and foremost among this Court's criteria is the availability of the benefit for a wide variety of vocational and educational purposes. This Court has twice noted in its recent cases that the

"provision of benefits to so broad a spectrum of groups is an important index of secular effect," Widmar v. Vincent, 454 U.S. 263, 274 (1981); Mueller v. Allen, supra, 103 S.Ct. at 3068, if only because a statute which submerges religion into a larger group of beneficiaries sends an entirely different message about religion's role in society than one that singles out religion explicitly for special treatment.

The Washington vocational rehabilitation statute under which Witters seeks assistance provides that persons eligible for assistance under the statute may use the funds for a wide variety of vocational or educational programs. Religion is aided only as and if individuals seek to use it for religious training. As far as appears on the record, Witters is the only person in Washington to have ever

sought to do so;* it cannot therefore be said that the benefits to religion as a social institution are anything but "remote" and "incidental" Mueller v. Allen, supra, 103 S.Ct. at 3069.

Further, here, the state has no interest in, and has apparently not urged, the blind to use their benefits for religious education. Religion as a whole is not advanced under this program. The state has merely agreed to provide the blind, who would otherwise be at risk of becoming charges on society, the means to become self-sufficient. That in this case funds go to a seminary is no more chargeable to the state than if a church were the winner of a state-run lottery.

This Court has invoked the principle that religion is not impermissibly advanced

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* Cf. Widmar v. Vincent, supra, 454 U.S. at 275 (noting absence of proof that religious speakers would dominate limited public forum).

when benefits go to a broad spectrum of groups (and pursuant to individual choices) in upholding state student loan schemes under which those attending even pervasively sectarian institutions are eligible for loans, Americans United v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977); Durham v. McLeod, 192 So.2d 202 (S.C. 1972), aff'd, 413 U.S. 902 (1973). These results were explained in PEARL v. Nyquist, supra, 413 U.S. at 782, n.38:

> [we] need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See Wolman v. Essex, 342 F. Supp. 399, 412-413 (S.D. Ohio), aff'd, 409 U.S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U.S.C. § 1651, impermissibly advance religion in violation of the Establishment

Clause. See also n. 32, supra.* Those decisions are controlling here.

The effect of advancing religion is further diluted because the aid is "available only as a result of numerous private random choices," Mueller v. Allen, supra, 103 S.Ct. at 3069.**

These principles are not just post hoc rationalizations of a pre-ordained result. Rather, properly applied, they can assist a court in determining whether a particular practice poses the dangers the Establishment Clause was designed to forestall. Those dangers as applied to this case are four-fold:

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* However, Americans United v. Bubb, 379 F. Supp. 872 (D. Kan. 1974) and D'Errico v. Lesmeister, 570 F. Supp. 158 (D.N.D. 1983), held that students at pervasively sectarian colleges could not participate in student loan programs in view of the Establishment Clause.

** To be sure, it is not alone determinative, PEARL v. Nyquist, supra, 413 U.S. at 782, n.38.

1) Non-coercion, so that persons not be pressured into participation in religious practices by government. Witters was not coerced into using his vocational funds for theological training. This is clearly not a coercion case. Marsh v. Chambers, 103 S.Ct. 3330, 3335 (1983).

2) Structural separation, so that religion and government not become too dependent on one another. Where the state designs a program intended to subsidize religious institutions, there is a substantial risk that that institution will become addicted to government funding for continued financial support. A symbiotic relationship inhospitable to religious liberty and governmental neutrality is the likely result, Larkin v. Grendel's Den, supra.* For the reasors stated above, this

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* The likelihood of dependence on government is here further reduced by the fact that only a limited class of persons -- who have almost no control over their own eligibility, and no independent incentive to become eligible -- is eligible for the aid.

is not a case where this is a likely possibility.

This is not a case -- as Mueller v. Allen was -- where the foreseeable impact of a statute or practice is to provide sums that in absolute terms are sufficiently significant as to induce dependence on government, and to make it likely that government will in effect gain control, cf. Wolman v. Walter, 433 U.S. 229, 256 (1977) (Brennan, J., concurring and dissenting) (sheer size of aid to parochial schools makes such aid programs suspect). Nor is it a program which provides funds on such a regular periodic basis that the religious institution can come to rely on such funds in budgeting.

3) The unfairness of using the taxing power to support religion, for it is unjust to use government's taxing power to compel a person to support a religious faith other than his own. Allowing the state to

pay the costs of Witters' theological training in one sense does just that.

Madison's Remonstrance, perhaps the most eloquent expression of opposition to such taxes, was written to counter a tax levied for the support of ministers of the gospel, Everson v. Bd. of Educ., supra. There is, therefore, a close parallel between the taxes Madison objected to in the Remonstrance and aid to parochial school schemes. For this reason, the Court has properly invalidated most such legislation.

There is, however, simply no parallel between such a use of tax funds and paying for Witters' vocational rehabilitation even though it entails paying for advanced theology training.

4) A breach of governmental neutrality, in Justice O"Connor's phrase, makes "adherence to a religion relevant in any way to a person's standing in the political community," or would "foster the

creation of political constituencies defined along religious lines," Lynch v. Donnelly, supra, 104 S.Ct. at 1366; Larkin v. Grendel's Den, supra.

That fear is particularly relevant where government sponsors a religious exercise, as in the case of school prayer or religious symbols, or, perhaps, delivers social services exclusively through sectarian social service agencies. It has no relevance here.

Neither Witters or anyone else gains or loses social standing by allowing the state to pay his tuition at Inland Empire. Nor would such a decision create any realistic likelihood that political constituencies will divide along religious lines. Allowing Witters to participate would not require other blind citizens to identify with some religion in order to participate in a government funded program.

In sum, while the payment of tuition to a theological seminary does have the effect of advancing religion, the impact of that payment is greatly attenuated in this case. Still, were this case to be evaluated solely in terms of the Establishment Clause, it would be a close case, perhaps tilting in favor of an affirmance.*

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* The final branch of the tripartite test for determining whether a practice violates the Establishment Clause is whether the statute or practice unduly entangles government with religion.

There is nothing in this record arguably to suggest that the grant Witters seeks in fact did create any political controversy.

Because the funds for Witters' grant come from a lump sum appropriation to the State Department of Services for the Blind, there is no likelihood that the legislature will annually become embroiled in a dispute over particular uses of these funds, Mueller v. Allen, supra, 103 S.Ct. at 3071, n.11.

Moreover, there is nothing in either the statute or the record which would indicate any greater need for supervision than in the case of college student loan programs, which, as noted, have been upheld by this Court.

III. Free Exercise

Had the Founding Fathers determined to protect religious liberty only by including a prohibition on religious establishments in the Bill of Rights, this would be a difficult and close case, notwithstanding the existence of factors which tend to mitigate the "establishing" effect. The political concerns which gave rise to the First Amendment were not so limited.

The Founders apparently recognized that non-establishment could not alone guarantee religious liberty. Taken as the sole guarantor of religious liberty it would "partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious," School Dist. of Abington Twshp. v. Schempp, supra, 374 U.S. at 306 (Goldberg, J., concurring).

Government cannot interfere with religious liberty by outlawing a particular belief or by punishing persons merely for holding or expressing those beliefs. Such actions are absolutely foreclosed by the Free Exercise Clause, Sherbert v. Verner, supra, 374 U.S. at 402; W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Religious liberty is also denied when government compels persons to act in violation of their religious values, Wisconsin v. Yoder, 406 U.S. 205 (1972). Religious liberty is also denied, under this Court's cases, if government denies participation in its social welfare programs to otherwise eligible persons who are unable to participate because of their religious practices, Thomas v. Rev. Bd., supra; Sherbert v. Verner, supra, notwithstanding the fact that government does not directly regulate religious practice as such.

The constitutional values represented by these different strands of free exercise doctrine reflect an attitude of hospitality towards religion. They embody society's recognition that it ought not -- indeed cannot properly -- interfere with deeply held beliefs, absent the most compelling justification. See Gianella, Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 Harv. L. Rev. 1381, 1411-14 (1967). The Free Exercise Clause is the constitutional policy which more than any other recognizes the worth of the individual and the sacredness of individual conscience, of the right to march to one's own drummer, to make judgments about ultimate values.

Religious commitments vary in intensity. How a person choses to manifest his religious faith is protected from government interference by the Free Exercise Clause. It is not the role of government to

evaluate or regulate the validity or extent of one's religious commitment, Thomas v. Rev. Bd., supra, 450 U.S. at 715-16.

McDaniel v. Paty, 435 U.S. 618 (1978), recognizes that the call to act as a minister is protected from unjustified state interference by the Free Exercise Clause.

> Tennessee ... acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention.... Yet under the clergy disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other.... In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access tc the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." Sherbert v. Verner, 374 U.S. 398, 406 (1963).

435 U.S. at 626.

The parallels between this case and McDaniel (as well as to Sherbert and Thomas)

are obvious. The Free Exercise Clause was implicated in those cases because the First Amendment "does not require the state to be [the] adversary [of religion]. State power is no more to be used so as to handicap religions, than it is to favor them," Everson v. Bd. of Educ., supra, 330 U.S. at 18.

When "individual Catholics ... or the members of any other faith, because of their faith, or lack of it, ... [are denied receipt of] the benefits of public welfare legislation," Thomas v. Rev. Bd., supra, 450 U.S. at 716, quoting, Everson v. Bd. of Educ., supra, 330 U.S. at 16 (1947) (emphasis deleted), the Free Exercise Clause is implicated.

The denial of vocational rehabilitation benefits to Witters, based solely on the fact that he has chosen to attend theological seminary, touches upon the values protected by the Free Exercise Clause

just as surely as did Tennessee's restriction on public office holding by ministers.

Without regard to whether the Free Exercise Clause is sufficient of its own force to require a state to make vocational training funds available for eligible persons seeking to pursue a religious career,* it is sufficient to counterbalance

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* This Court has repeatedly rejected free exercise claims that the state must fund otherwise eligible religious institutions if there is no constitutional bar to such funding under the Establishment Clause, Bob Jones University v. U. S., 103 S.Ct. 2017 (1983); Norwood v. Harrison, 413 U.S. 455 (1973); Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (Mo.), aff'd , 419 U.S. 888 (1974); Everson v. Bd. of Educ., supra.

Whether this case is closer to cases such as Thomas v. Rev. Bd., supra, or Sherbert v. Verner, supra, is a difficult question. Indeed in Everson v. Bd. of Educ., supra, the Court's opinion contains language both suggesting that the state cannot deny funds to a religious institution simply because it is such, 330 U.S. at 16, and other language suggesting that it has discretion not to fund such institution, Id. The Court need not resolve this issue in this case for reasons we explain below.

the relatively minimal "establishment" which results when a state does so. As noted above, this is at best a weak establishment Clause case on the merits. Whatever little strength there was in the establishment argument is more than outweighed by the free exercise value to be vindicated by not obstructing Witters' efforts to become ordained.

The balancing approach urged here is not appropriate for every case. In some cases, a challenged practice is clearly contrary to the purposes of one or the other clauses. Thus, the prohibition on direct, unrestricted aid to churches or parochial schools is so central to the Establishment Clause as to call for no inquiry under the Free Exercise Clause, much less any balancing process.

Requiring states to allow Sabbath observers to participate in unemployment insurance programs even if they turn down

work on their Sabbath, or excusing the Amish from some portion of the compulsory education laws, pose no threat whatsoever to Establishment Clause values. There, too, no balancing is called for.

On the other hand, in McDaniel v. Paty, supra, where Tennessee defended a provision excluding clergymen from public office on the ground that the exclusion was necessary to preserve the separation of church and state, this Court, after finding that this prohibition violated the Free Exercise rights of clergymen, turned to Tennessee's Establishment Clause argument.

It rejected Tennessee's argument not because it found that the Establishment Clause was not a defense to a free exercise claim, but because there was simply no adequate factual basis for the Establishment Clause claim:

> Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political

> process have not lost whatever validity they may once have enjoyed. The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. ... [T]he American experience provides no persuasive support for [that] fear.... (citations and footnote omitted)

435 U.S. at 628-29.

Had there been a factual predicate for the state's claim, the Court would have been forced to engage in a balancing process.

A similar process was undertaken by this Court in Widmar v. Vincent, supra, where the Free Speech and Establishment Clauses came into conflict. The Court there determined that college students' free speech rights had been violated by a rule barring student religious clubs from using empty classrooms for its meetings, a right conferred on other student groups. It then

assessed the significance of the university's claim that allowing the clubs to meet would place it in the position of establishing religion. Again, this Court found that the Establishment Clause arguments were not sufficiently strong on the record before it to justify the denial of free speech. Following a similar analysis, but on a different factual record, the Third Circuit reached an opposite result in the high school setting, Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984), cert. granted, 53 U.S.L.W. 3585 (1985).

The balancing method of analysis is consistent with this Court's description of its First Amendment decisions, under which "short of [governmentally established religion or governmental interference with religion] there is room for play in the joints...." Walz v. Tax Comm'n, supra, 397 U.S. at 669. Even more to the point is

Professor Wilber Katz' statement that the First Amendment insures "a secular state -- but a secular state which does not give preference to secularism and is actively concerned for religious freedom," W. G. Katz, Religion and American Constitutions 22 (1964).

The balance in this case tips decidedly in favor of Witters. This is a marginal claim under the Establishment Clause. Although the Free Exercise Clause may not mandate that Witters be declared eligible for participation in such programs, it surely implies that "the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints .. [for] cautiously delineated secular ... assistance...." Norwood v. Harrison, supra, 413 U.S. at 469. This is a case in which that value should at least allow the state the option of paying for Witters' vocational training as a minister.

IV. The Free Exercise Issue Need Not Be Reached

The Washington Supreme Court held that the Establishment Clause was a bar to Witters' participation in the state's vocational rehabilitation program. That judgment, as we have shown, is erroneous. Should this Court agree, Witters' application will be granted unless and until the state constitution is held to bar it.

Only if the Washington courts so hold will there be any need for this Court to reach the federal Free Exercise Clause issue raised by petitioner. In view of the rule confining constitutional decisions to cases of "strict necessity," this Court should not now pass on this issue, Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947).*

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* Accord, Minnick v. California Dep't. of Corrections, 452 U.S. 105 (1981); NYCTA v. Beazer, 440 U.S. 568 (1979); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971); Sacks v. Ga., 401 U.S. 144 (1971); W. E. B. Dubois Clubs of America v. Clark, 389 U.S. 309 (1967).

Conclusion

The judgment should be reversed and remanded to the state court for further proceedings.

Respectfully submitted,

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